

The Joint Committee on the Office of Natural Resource Public Interest Counsel



Report to the 78th Legislature

December 2002

Joint Interim Committee on the Office of Natural Resource Public Interest Counsel

Senator J.E. "Buster" Brown, Co-Chair
Representative Fred Bosse, Co-Chair
Senator Gonzalo Barrientos
Senator David Bernsen
Senator Chris Harris



Senator Leticia Van de Putte
Representative Warren Chisum
Representative Dawnna Dukes
Representative Robert Puente
Representative D.R. "Tom" Uher

December 3, 2002

The Honorable Bill Ratliff, Lieutenant Governor of Texas
The Honorable James E. "Pete" Laney, Speaker of the House of Representatives of Texas
Members of the Texas Legislature
Texas State Capitol
Austin, Texas 78701

Dear Governor Ratliff, Speaker Laney, and Fellow Members:

The Joint Committee on the Office of Natural Resource Public Interest Counsel of the Seventy-Seventh Legislature hereby submits its interim report including findings and recommendations for consideration by the Seventy-Eighth Legislature.

Respectfully submitted,

Handwritten signature of Representative Fred Bosse in blue ink.

Representative Fred Bosse, Co-Chair

Handwritten signature of Senator Gonzalo Barrientos in blue ink.

Senator Gonzalo Barrientos

Handwritten signature of Senator David Bernsen in blue ink.

Senator David Bernsen

Handwritten signature of Senator Chris Harris in blue ink.

Senator Chris Harris

Handwritten signature of Senator Leticia Van de Putte in blue ink.

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Handwritten signature of Representative Warren Chisum in blue ink.

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Handwritten signature of Representative Dawnna Dukes in blue ink.

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Handwritten signature of Representative Robert Puente in blue ink.

Representative Robert Puente

Representative D.R. "Tom" Uher

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INTRODUCTION

In the summer of 2000, the Texas Natural Resource Conservation Commission (TNRCC) came under Sunset review. One of the recommendations issued by the Sunset Advisory Commission was to strengthen the Office of Public Interest Counsel. House Bill 2912 (the TNRCC Sunset bill) made some changes to the portion of the code dealing with the Public Interest Counsel, and also directed the Lieutenant Governor and the Speaker of the House to appoint a ten-member joint interim committee to study the issue.

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INTERIM CHARGE

A joint interim study shall be conducted by a joint committee consisting of five members of the senate appointed by the Lieutenant Governor and five members of the House of Representatives appointed by the Speaker of the House. The Committee shall study and report to the 78th Legislature on the issues associated with establishing an Office of Natural Resource Public Interest Counsel. The issues addressed shall include:

1. the authority of the office of public interest counsel, including the authority to appeal decisions of the Texas Natural Resource Conservation Commission;
2. resources needed to carry out the functions of the office; and
3. the relationship of the office to other public assistance efforts in the agency and the need for an agency ombudsman.

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BACKGROUND

The following is a summary of the actions taken by the Sunset staff, the Sunset Advisory Commission, the House of Representatives, the Senate, and the HB 2912 conference committee.

The Sunset staff recommended four changes:

- Require the Governor to appoint the Counsel with the advice and consent of the Senate.
- Specify that the Counsel's role includes representing the public's interest in the development of agency rules and policies.
- Authorize the Counsel to appeal a decision of the Commission in court.
- Authorize the Counsel to obtain technical support from outside the agency.

The Sunset Commission decided to recommend these changes:

- Authorize the Public Interest Counsel to obtain technical support from outside the agency.
 - Outside technical support could alleviate inherent conflicts caused by the Counsel and the TNRCC Executive Director both using agency-generated technical information.
 - The cost of this effort would be capped at \$100,000 per year, through the appropriations process.
- Authorize the Counsel to recommend needed legislative and regulatory changes.

HB 2912, as originally filed, contained the provisions that the Sunset Advisory Commission recommended. During second reading in the House, an amendment by Representative Puente made the Office of Public Interest Counsel an independent agency. The amendment contained the following provisions:

- Establish an independent Natural Resource Public Interest Counsel.
 - The Counsel would be appointed by the Governor, with advice and consent of the Senate.
 - The Counsel would have to meet eligibility requirements.

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The Counsel would be able to appeal TNRCC decisions in court.

- Transfer existing staff and resources of TNRCC's¹ Public Interest Counsel to fund this new agency.

The Senate version went back to the Sunset recommendations. In conference, the Sunset provisions remained and a provision was added requiring this interim study.

¹ HB 2912 changed the name of the Texas Natural Resources Conservation Commission to the Texas Commission on Environmental Quality (TCEQ) effective September 1, 2002. For the rest of the report, the new name is used.

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TCEQ's PUBLIC INTEREST COUNSEL

The Texas Legislature created the Office of Public Interest Counsel (OPIC) to promote the public interest and consumer protection and to guarantee the Commission's responsiveness to citizens' concerns regarding environmental quality.

OPIC carries out its responsibilities by (1) participating as a party in contested case hearings on air quality, water quality and solid waste disposal permit applications; (2) participating as a party in contested case hearings in utility rate increase applications; (3) reviewing and commenting on proposed rulemaking; (4) reviewing and possibly participating in enforcement actions; and (5) commenting on various other matters set for consideration at the commission's public meetings.

As a party to every permitting and utility-related contested case proceeding, the OPIC strives to provide balance to the hearings process. With respect to environmental permitting applications, the OPIC seeks to ensure that the application satisfies all legal requirements and will be adequately protective of human health and the environment. With respect to utility rate increase applications, the OPIC seeks to ensure that changes in water or sewer rates are justified and reasonable. The OPIC works independently of other TCEQ offices to bring forward relevant issues from a public interest perspective. The OPIC's goal is to ensure that all relevant evidence is developed and made part of the record so that the commission may make informed decisions and issue permits that are protective of human health and the environment. The Public Interest Counsel is appointed by the commission. The office is also staffed with six other licensed attorneys.

The OPIC participates in rulemaking projects that have a significant effect on public participation or environmental protection. When appropriate, the OPIC provides comments to the commission on proposed agency rules and policy.

With respect to enforcement proceedings, the OPIC helps citizens understand procedures for making complaints about potential environmental violations and the TCEQ's enforcement process. Also, with respect to persons who have enforcement actions initiated against them, the OPIC helps those persons

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understand their rights and duties to request a hearing and the hearing process.

The statutory provisions relating to the Office of Public Interest Counsel can be found in the Texas Water Code, Chapter 5, Subchapter G (sections 271 through 275).

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OTHER PUBLIC ASSISTANCE EFFORTS AT TCEQ

In this Committee's discussions on the Office of Public Interest Counsel (OPIC), we have explored the relationship between the OPIC and other points of contact for the public within the agency. The other public assistance efforts at TCEQ include: Small Business and Environmental Assistance, the Office of Public Assistance, the Environmental Equity Program, and Alternative Dispute Resolution section.

Office of Public Assistance

The Office of Public Assistance (OPA) has broad-ranging contact with the public and very significant duties internal to the working of TCEQ.

OPA is designated as the TCEQ's customer service representative. It acts as an information resource for citizen phone calls concerning applications for permits or the permitting process in general and conducts the Customer Service Survey, which is reported in the agency's strategic plan. OPA is the office that conducts public meetings on permits, notice and comment hearings, and schedules, posts notice and facilitates rule hearings. In addition to coordinating and tracking responses to all letters sent to the commissioners and all letters from elected officials to the Executive Director, OPA acknowledges, evaluates, and categorizes protestant mail received by TCEQ, and summarizes contact with protestants and hearing requestors.

Internally, the OPA reviews the Executive Director's draft responses to comments on proposed rules, reviews proceedings, rules, and statutes when requested by the Office of the General Counsel, and provides technical support to the Office of the General Counsel and the Office of the Chief Clerk.

OPA coordinates agency responses to all Title VI complaints filed against TCEQ and manages TCEQ's environmental equity program, including providing support to agency staff in minority and low-income areas.

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Environmental Equity Program

TCEQ's Environmental Equity Program was established in 1993 to improve communication between government, low-income or minority communities, and neighboring industries in order to address concerns regarding the communities' share of environmental risks.

Staff helps community groups understand the agency's processes and promote a dialogue with the industry or facility that is of concern. Environmental equity staff act to resolve disputes between the community and the industry or facility. This role involves determining what the issues are, establishing communication between the parties, and encouraging the development of mutually acceptable solutions. Addressing problems in the early stages can keep the issue from escalating into more confrontational situations such as contested case hearings, class action lawsuits, and Title VI complaints. This often saves money, time, and helps promote a spirit of cooperation.

Staff focus much of their efforts on developing proactive campaigns targeted at increasing environmental awareness in communities. The Environmental Equity Program also works to increase TCEQ staff awareness about environmental equity and justice issues. In particular, the program encourages technical staff to consider that the environmental programs they develop for businesses also affect the communities living around those businesses. With this consideration, staff can design programs that minimize potential problems.

Small Business and Environmental Assistance

TCEQ staffs a department to serve businesses with under 100 employees and local governments. This division helps customers prevent pollution, conserve resources, and achieve compliance with regulations. Staff members work to educate customers in Texas and along both sides of the Texas section of the U.S.-Mexico border through seminars, trade fairs, workshops, toll-free hot lines, and on-site technical assistance. It also recognizes environmental achievements and inspires successes through voluntary programs, awards, and special events.

The division provides educational information and recycling and disposal opportunities for the citizens of Texas; promotes recycling and composting

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through market development; provides technical assistance to small businesses and local governments; promotes regulatory flexibility; administers the reporting requirements for the Waste Reduction Policy Act; reviews applications for pollution control property tax exemptions; and works to make businesses aware of innovative technology that may help them prevent pollution.

There are compliance assistance specialists in each of the 16 TCEQ regional offices.

Alternative Dispute Resolution for Disputed Environmental Permit Applications

A protestant who wants to contest an environmental permit application must file a request with the agency's chief clerk that a public hearing be held on the permit application. When this occurs, the agency's executive director and its public interest counsel make recommendations to the Commission regarding the validity of the hearing request.

If the Commission determines that a hearing is warranted, the case may be referred to the agency's Alternative Dispute Resolution Office (ADR Office) for mediation between the disputing parties prior to the hearing being convened. Even when the Commission refers a case directly to the State Office for Administrative Hearings for hearing, the ADR Office will try to work with the parties before the hearing to resolve their dispute.

Because of the growing cost of contested case proceedings to all parties, the agency uses alternative dispute resolution to resolve these cases whenever possible. This has often shortened the permit application process and cut participation costs for the protestants, applicants, and the state.

The mediation process is not designed to delay the application or hearing process. Participation in agency-organized alternative dispute resolution is not a pre-determination by the Commissioners that any protestant has legal standing to request a hearing.

Ombudsman

As part of its interim charge, the committee was requested to study the need for

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an agency ombudsman. There was no public testimony on this subject. Webster's Ninth New Collegiate Dictionary defines "ombudsman" as (1) a government official (as in Sweden or New Zealand) appointed to receive and investigate complaints made by individuals against abuse or capricious acts of public officials; and (2) one that investigates reported complaints (as from students or consumers), reports findings, and helps to achieve equitable settlements.

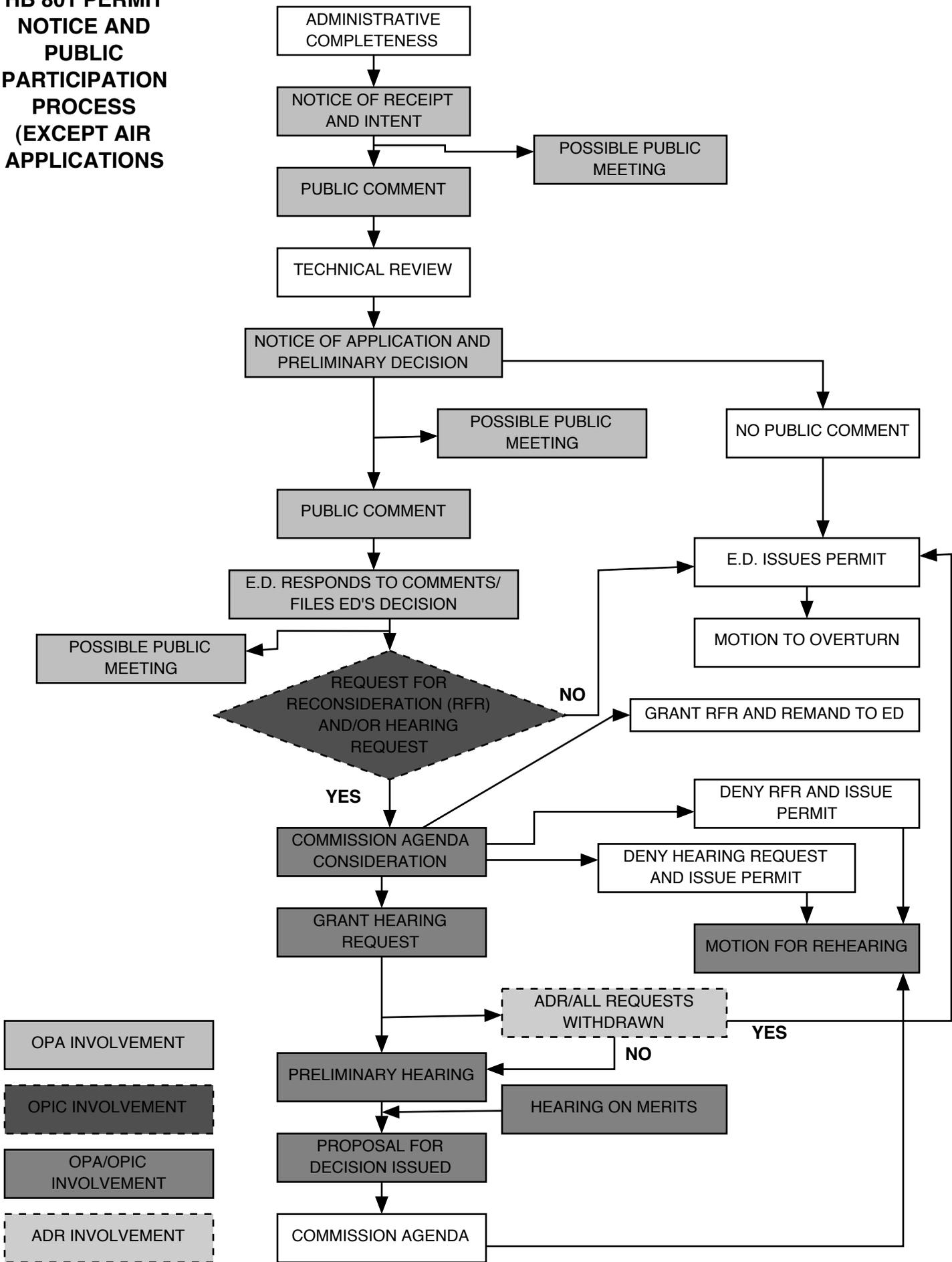
While it appears that the functions of an ombudsman under these definitions, would, to a large extent be redundant of those of TCEQ's other public assistance efforts, the committee made no finding or recommendation as to its need.

TCEQ's Permitting Process

While there is no single way in which permits negotiate the commission's decision-making process, the permitting process outlined by HB 801, is a close approximation of the process in general. The chart on the following page shows how and when the public interacts with those procedures.²

² Chart provided by TCEQ.

**HB 801 PERMIT
NOTICE AND
PUBLIC
PARTICIPATION
PROCESS
(EXCEPT AIR
APPLICATIONS)**



- OPA INVOLVEMENT
- OPIC INVOLVEMENT
- OPA/OPIC INVOLVEMENT
- ADR INVOLVEMENT

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OTHER PUBLIC INTEREST COUNSELS

There are two other public interest counsels in Texas: the Office of Public Utility Counsel and the Public Insurance Counsel. Unlike the TCEQ's Office of Public Interest Counsel, the Public Utility and Public Insurance Counsel are both agencies separate and apart from the agencies with which they are concerned, the Public Utility Commission and Texas Department of Insurance. In discussions about TCEQ's Office of Public Interest Counsel, and its fundamental structure, many point out similarities and differences between its scope and functions and those of the other two offices.

Office of Public Utility Counsel (OPUC)

This agency was established in 1983 by the Texas Legislature to represent residential consumers and small business as a class (that is, not individually) before the Public Utility Commission (PUC). The creation of OPUC was a legislative response to growing public concern that telephone and electric utility ratepayers did not have adequate representation in proceedings that would eventually affect them. It is provided for in the Public Utility Regulatory Act and can be found in Chapter 13 of the Texas Utilities Code.

Function and Scope

Appointed by the governor and confirmed by the senate, the Public Counsel serves for a two-year term. This individual must be an attorney licensed to practice law in Texas and be a Texas resident. He or she is responsible for developing agency policy and for directing the overall activities of OPUC. One of the counsel's most significant tasks is deciding which cases in which to intervene. OPUC has the power to appear as a party to any proceeding before the PUC or other judicial proceedings where residential and small business ratepayers need representation. The office is divided into four sections, including attorneys, regulatory analysts, support staff, and administrative staff, together numbering between 20 to 25 persons.

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Office of Public Insurance Counsel (OPIC)

This state agency was established in 1987 and represents consumers as a class before the Texas Department of Insurance, and other state agencies when necessary, in insurance matters relating to insurance rates, rules, and policy forms. Although OPIC's statutory mandate does not authorize it to represent individual consumers, the agency has the discretion to become involved when individual complaints indicate a widespread questionable industry practice. The enabling statute for the Office of Public Insurance Counsel can be found in the Texas Insurance Code, Article 1.35A.

Function and Scope

The Public Counsel serves as executive director of OPIC. He or she is appointed by the governor and confirmed by the senate for a two-year term. The agency maintains a staff of about 20, including researchers, attorneys, support staff, and economists. The office functions as consumer advocate, attempting to secure for the public lower insurance rates and other consumer advantages in the areas of policy form approval and administrative rulemaking. OPIC responds to legislative and executive requests for information on insurance issues, and works closely with the Department of Insurance, civic and consumer groups, and industry toward resolution of insurance problems. The office produces and distributes reports and its research is often the basis of rule proposals and legislative initiatives addressing consumer issues.

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HEARINGS

The Joint Committee of the Office of Natural Resource Public Interest Counsel met on the following dates. During the course of its meetings the committee accepted both public and invited testimony.

April 1, 2002

May 20, 2002

August 20, 2002

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RECOMMENDATIONS

1. Give the Office of the Public Interest Counsel an independent budget, including \$100,000 annually for outside technical expertise.
2. Allow the Public Interest Counsel to appeal rules packages, if it appears that they were adopted without proper legal procedure or exceed the authority of the TCEQ.
3. Allow the Public Interest Counsel to appeal when the Commission has substantially amended a proposal for decision from the State Office of Administrative Hearings, and appeal is necessary to serve the broad public interest.